

## **Summary of SC93658, *Jessica Chavez v. Cedar Fair LP***

Appeal from the Clay County circuit court, Judge A. Rex Gabbert

Argued and submitted March 12, 2014; opinion issued November 12, 2014, and modified on the Court's own motion December 23, 2014

**Attorneys:** Cedar Fair was represented by David R. Frye, Thomas H. Stahl and Chad E. Blomberg of Lathrop & Gage LLP in Kansas City, (816) 292-2000. Chavez was represented by Steven L. Hobson, H. William McIntosh and Meredith R. Peace of The McIntosh Law Firm PC in Kansas City, (816) 221-6464.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** The operator of an amusement park appeals the trial court's judgment in favor of a girl injured on one of the park's rides. In a 5-2 decision written by Judge Patricia Breckenridge, the Supreme Court of Missouri reverses the judgment and remands (sends back) the case. The trial court erred in instructing the jury that the amusement park operator owed the highest degree of care to the girl. The proper standard is whether the operator exercised an ordinary duty of care. The instruction was prejudicial, requiring reversal and the opportunity for retrial.

Judge Richard B. Teitelman dissents. He would hold that, given the amusement park's control of the ride and the patron's safety on the ride, the trial court did not err in instructing the jury that the park had a duty to operate the ride with the highest degree of care.

**Facts:** In August 2000, 12-year-old Jessica Chavez was injured while riding the Hurricane Falls raft ride at Oceans of Fun, a Kansas City amusement park owned by Cedar Fair LP. Hurricane Falls is a 680-foot-long raft water slide with twists and turns and a 71-foot drop. During the ride, four to five passengers are seated cross-legged in the bottom of a circular raft, which descends down an open fiberglass flume, propelled by a water flow of 8,000 gallons per minute. The rafts' only safety features are nylon webbing safety straps that run along portions of the top of the rafts. Riders are not buckled in because of the risk of drowning if a raft were to capsize. Riders must be a minimum of 46 inches tall to ride the Hurricane Falls, and signs leading to the loading platform advise riders to "hold on to straps at all times," and before the ride begins, attendants give the same instructions to passengers verbally. When their turn came to ride, Chavez was seated as instructed, directly across from her cousin. As their raft rode up the splash wall on the ride's final turn, Chavez's mouth and her cousin's head collided, pushing Chavez's braces into her gums and knocking out her front tooth. Her injuries required extensive dental work, including removing some of her front teeth and replacing them with dentures. In 2005, Chavez sued Cedar Fair, claiming it failed to provide friction devices reasonably sufficient to prevent a raft rider from colliding with another rider and failed to provide adequate warning of the risk of harm from colliding with other raft riders. During the 2012 trial, conflicting testimony was given about how the collision happened and whether Chavez or her cousin let go – voluntarily or involuntarily – of the raft's safety strap. Both parties also presented expert testimony about the adequacy of the ride's safety features and the measures Oceans of Fun took to ensure passenger safety. For Chavez's negligence claim, the trial court instructed the jury – over Cedar Fair's

objection – that negligence means “the failure to use the highest degree of care,” which it instructed the jury meant “that degree of care that a very careful person would use under the same or similar circumstances.” The trial court also refused to submit to the jury the instruction Cedar Fair proffered that would have required the jury to determine Chavez’s percentage of fault, if any. The jury returned a verdict in favor of Chavez, awarding her \$225,000 in damages. The court entered judgment accordingly. Cedar Fair appeals.

## **REVERSED AND REMANDED.**

**Court en banc holds:** (1) The trial court erred in instructing the jury to assess Cedar Fair’s negligence using a standard requiring the highest degree of care. Instead, it should have submitted an instruction using the standard of ordinary care. In most negligence cases, this Court has applied a standard imposing a duty of ordinary care – care a reasonable person of ordinary prudence would use under similar circumstances. In its 1933 decision in *McCollum v. Winnwood Amusement Company*, this Court rejected the highest degree of care standard for amusement park operators, holding they owe only a duty of ordinary care to their patrons. This is consistent with the Court’s 1928 decision in *Berberet v. Electric Park Amusement Park*, holding that the proprietor of a place of amusement owes to his patrons the duty of ordinary care or reasonable care for their safety, as well as with several later opinions of this Court and the court of appeals. This Court has reserved the higher degree of care to a small number of well-defined activities – including those involving common carriers (such as those who transport individuals via commercial airplanes, buses or trains), electric companies, users of explosives or firearms, and motor vehicle operators. At the time the highest degree of care was applied, the activities were considered to be so inherently or extremely dangerous, with such a risk of widespread injury, that the law required heightened protection. This Court never has found that the public policy underlying use of the highest degree of care supports its application to amusement park operators. This Court’s decision in *McCollum* is most similar to Chavez’s case – in terms of the injurious event, the negligence claims asserted and the issue raised on appeal – and, as such, is controlling. Application of the ordinary duty of care is supported by the facts that Cedar Fair is not a common carrier and the ride is not inherently dangerous. Even though the mode of amusement is mobile, the amusement park is not in the transportation business and, therefore, is not a common carrier. Likewise, Missouri case law does not support extending the duty to exercise the highest degree of care to operators of amusement park rides, which are not so new, dangerous or essential that they justify the highest degree of care. The ordinary degree of care is sufficiently flexible to protect amusement park patrons adequately because the exercise of ordinary care requires precautions commensurate with the dangers reasonably anticipated under the circumstances. An erroneous jury instruction that imposes on a party a higher standard of care than that required by law is prejudicial, requiring a new trial. Cedar Fair was prejudiced by the negligence instruction and is entitled to have the judgment reversed and the case remanded.

(2) It is not necessary for this Court to adjudicate the merits of Cedar Fair’s claim of error related to the court’s refusal of its proffered comparative fault instruction. The sufficiency of the evidence to submit a comparative fault instruction must be determined based on consideration of the evidence presented in the new trial, at which Cedar Fair will have an opportunity to submit a different comparative fault instruction that can address Chavez’s challenge as to its form.

**Dissenting opinion by Judge Teitelman:** The author would hold that the trial court did not err in instructing the jury that Cedar Fair had a duty to operate the water slide with the highest degree of care. While Chavez freely chose to ride the slide, she was dependent for her safety on Cedar Fair, which had complete control of the slide as its owner and operator. Under these circumstances, consistent with previous cases, the instruction was not in error.